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22 **UNITED STATES DISTRICT COURT**
23 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

24	CENTER FOR BIOLOGICAL DIVERSITY,)
25	CENTER FOR ENVIRONMENTAL HEALTH,)
26	and SIERRA CLUB,)
27) Civ. No. 18-cv-3544-YGR
28	Plaintiffs,)
) FIRST AMENDED
	v.) COMPLAINT FOR INJUNCTIVE
) AND DECLARATORY RELIEF
)
	ANDREW R. WHEELER,) (Clean Air Act, 42 U.S.C. §§ 7401 <i>et.</i>
) <i>seq.</i>)
	in his official capacity as Acting)
	Administrator of the United States)
	Environmental Protection Agency,)
)
	Defendant.)

INTRODUCTION

1
2 1. This is a Clean Air Act “deadline suit” against Andrew R. Wheeler for his failure to
3 protect people, ecosystems and wildlife from dangerous exposure to sulfur oxides (SO_x). SO_x,
4 in even very short exposure time periods—such as five minutes—has significant health impacts,
5 including decrements in lung function, aggravation of asthma, and respiratory and cardiovascular
6 morbidity. EPA has also determined that exposure to SO₂ pollution can aggravate existing heart
7 disease, leading to increased hospitalizations and premature deaths.
8

9 2. SO_x also contribute to the formation of acid rain, which damages trees, crops, historic
10 buildings, and monuments and alters the acidity of both soils and water bodies. Acute and
11 chronic exposures to SO_x lead to foliar injury, decreased photosynthesis, and decreased growth
12 of vegetation. EPA’s draft Integrated Review Plan acknowledged that SO_x have a potential to
13 negatively affect endangered species. The U.S. Fish and Wildlife Service (FWS) has already
14 identified many federally protected species that are negatively affected by atmospheric pollution
15 from SO_x.
16

17 3. In addition, because SO_x emissions may be transmitted long distances, they contribute to
18 visibility impairment problems in many national parks and wilderness areas. EPA has previously
19 found “that current levels of oxides of nitrogen and sulfur are sufficient to cause acidification of
20 both aquatic and terrestrial ecosystems, nutrient enrichment of terrestrial ecosystems and
21 contribute to nutrient enrichment effects in estuaries that could be considered adverse[.]” 77 Fed.
22 Reg. 20,218, 20,241-42 (April 3, 2012).
23

24 4. SO_x also facilitate mercury methylation. This creates the form of mercury which is
25 especially dangerous to humans and wildlife.
26

27 5. To better protect the public from the damage caused by SO_x, the United States
28

1 Environmental Protection Agency (EPA) promulgated a SOx National Ambient Air Quality
 2 Standard (NAAQS) in 1971 and again in 2010. The promulgation of these SOx NAAQS creates
 3 various mandatory duties which EPA must perform in order to effectively implement those SOx
 4 NAAQS. As detailed below, EPA is in violation of numerous Clean Air Act mandatory duties
 5 with regard to the SOx NAAQS.
 6

7 6. Specifically, EPA has a mandatory duty to take final action on state implementation plan
 8 (SIP) submittals within 12 months of those SIP submittals becoming administratively complete.
 9 42 U.S.C. § 7410(k)(2)-(4). EPA is in violation of this mandatory duty for the nonattainment
 10 areas and SIP elements listed in Table 1 below.
 11

12 **TABLE 1**

13 AREA & STATE	14 ELEMENT(S)	15 COMPLETION DATE	16 FINAL ACTION DUE DATE
17 Indianapolis, IN 18 Marion County 19 (part)	20 Attainment Demonstration, 21 Contingency Measures, 22 Emission inventory, 23 Nonattainment New Source 24 Review (NSR), Reasonably 25 Available Control 26 Measures/Reasonably 27 Available Control Technology 28 (RACM/RACT), Reasonable Further Progress (RFP).	2/25/2016	2/25/2017
Morgan County, IN Morgan County (part)	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RACM/RACT, RFP.	2/25/2016	2/25/2017
Southwest, IN Daviess County (part) Pike County (part)	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RACM/RACT, RFP.	2/25/2016	2/25/2017
Terre Haute, IN Vigo County (part)	Attainment Demonstration, Contingency Measures,	2/25/2016	2/25/2017

1		Emission inventory, Nonattainment NSR, RACM/RACT, RFP.		
2	Muscatine, IA	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RACM/RACT, RFP.	11/26/2016	11/26/2017
3	Muscatine County (part)			
4				
5				
6	Detroit, MI	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RACM/RACT, RFP.	11/30/2016	11/30/2017
7	Wayne County (part)			
8				
9	Jackson County, MO	Emission inventory	2/25/2016	2/25/2017
10	Jackson County (part)			
11	Lake County, OH	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RACM/RACT, RFP.	10/03/2015 for attainment demonstration. 2/25/2016 for other elements.	10/3/2016 for attainment demonstration. 2/25/2017 for other elements.
12	Lake County			
13				
14	Muskingum River, OH	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RACM/RACT, RFP.	10/03/2015 for attainment demonstration. 2/25/2016 for other elements.	10/3/2016 for attainment demonstration. 2/25/2017 for other elements.
15	Morgan County (part)			
16	Washington County (part)			
17	Steubenville, OH- WV, OH	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RACM/RACT, RFP.	10/03/2015 for attainment demonstration. 2/25/2016 for other elements.	10/3/2016 for attainment demonstration. 2/25/2017 for other elements.
18	Jefferson County (part)			
19				
20	Steubenville, OH- WV, WV	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RACM/RACT, RFP.	10/2/2016	10/2/2017
21	Brooke County (part)			
22				
23	Rhineland, WI	Attainment Demonstration, Contingency Measures, Emission inventory, Nonattainment NSR, RFP.	2/25/2016	2/25/2017
24	Oneida County (part)			
25				
26	Hayden, AZ	Attainment Demonstration, Contingency Measures, Emission Inventories, Reasonably available control measures/Reasonably available	9/26/2017	9/26/2018
27	Gila County (part) Pinal County (part)			
28				

	control technology (RACM/RACT), Reasonable Further Progress (RFP).		
Miami, AZ Gila County (part)	Attainment Demonstration, Contingency Measures, Emission Inventories, RACM/RACT, RFP.	9/26/2017	9/26/2018
Jefferson County, KY Jefferson County (part)	Attainment Demonstration, Contingency Measures, Emission Inventories, Nonattainment NSR, RACM/RACT, RFP.	10/10/2017	10/10/2018
Allegheny, PA Allegheny County (part)	Attainment Demonstration, Contingency Measures, Emission Inventories, Nonattainment NSR, RACM/RACT, RFP.	10/6/2017	10/6/2018
Beaver, PA Beaver County (part)	Attainment Demonstration, Contingency Measures, Emission Inventories, Nonattainment NSR, RACM/RACT, RFP.	10/5/2017	10/5/2018
Indiana, PA Indiana County Armstrong County (part)	Attainment Demonstration, Contingency Measures, Emission Inventories, Nonattainment NSR, RACM/RACT, RFP.	10/13/2017	10/13/208
Marshall, WV Marshall County (part)	Attainment Demonstration, Contingency Measures, Nonattainment NSR, RACM/RACT, RFP.	9/20/2017	9/20/2018

7. EPA also has a mandatory duty to make a finding that a state has failed to submit a required SIP submittal within six months of when that SIP submittal is due. 42 U.S.C. § 7410(k)(1)(B). EPA has violated this mandatory duty to make a finding of failure to submit nonattainment SIPs for the nonattainment areas listed in Table 2 below.

TABLE 2

AREA & ELEMENT(S)	SUBMITTAL DEADLINE (No later than)
New Jersey portion of the Northeast Pennsylvania-Upper Delaware Valley Interstate AQCR (part) 1971 primary SO ₂ SIP.	5/15/1992
Alton Township, IL, Madison County (part); Attainment Demonstration, Contingency Measures, Emission Inventories, Nonattainment New Source Review (NSR), Reasonably available control measures/Reasonably available control technology (RACM/RACT), Reasonable Further Progress (RFP).	3/12/2018
Williamson County, IL, Williamson County; Attainment Demonstration, Contingency Measures, Emission Inventories, Nonattainment NSR, RACM/RACT, RFP.	3/12/2018
Anne Arundel County and Baltimore County, MD, Anne Arundel County (part), Baltimore County (part); Attainment Demonstration, Contingency Measures, Emission Inventories, Nonattainment NSR, RACM/RACT, RFP.	3/12/2018
St. Clair, MI, St. Clair County (part): Attainment Demonstration, Contingency Measures, Emission Inventories, Nonattainment NSR, RACM/RACT, RFP.	3/12/2018

8. Accordingly, Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR ENVIRONMENTAL HEALTH and SIERRA CLUB bring this action against Defendant ANDREW R. WHEELER, in his official capacity as Acting EPA Administrator, to compel him to perform his mandatory duties with respect to the SO_x NAAQS.

JURISDICTION

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2 9. This case is a Clean Air Act citizen suit. Therefore, the Court has jurisdiction over this
3 action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 42 U.S.C. § 7604(a)
4 (Clean Air Act citizen suits).

5 10. An actual controversy exists between the parties. This case does not concern federal
6 taxes, is not a proceeding under 11 U.S.C. §§ 505 of 1146, and does not involve the Tariff Act of
7 1930. Thus, this Court has jurisdiction to order declaratory relief under 28 U.S.C. § 2201. If the
8 Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue injunctive relief.
9

10
11 **NOTICE**

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13 11. Plaintiffs mailed to EPA by certified mail, return receipt requested, written notice of
14 intent to sue regarding the violations alleged in this Complaint. EPA received the notice letter
15 regarding the claims in the original complaint by no later than March 19, 2018. Plaintiffs mailed
16 the notice letter regarding the claims added in the First Amended Complaint on October 15,
17 2018. More than sixty days have passed since Plaintiffs mailed these notice letters. EPA has not
18 remedied the violations alleged in this Complaint. Therefore, a present and actual controversy
19 exists between the parties.
20
21

22 **VENUE**

23
24 12. Defendant EPA resides in this judicial district. This civil action is brought against an
25 officer of the United States acting in her official capacity and a substantial part of the events or
26 omissions giving rise to the claims in this case occurred in the Northern District of California.
27 One of the claims in this Complaint concerns EPA's failure to perform mandatory duties with
28

1 regard to Arizona. EPA Region 9, which is responsible for Arizona, is headquartered in San
2 Francisco. Thus several of the events and omissions at issue in this action occurred at EPA's
3 Region 9 headquarters in San Francisco. In addition, Plaintiffs Center for Environmental Health
4 and Sierra Club are headquartered in Oakland. Accordingly, venue is proper in this Court
5 pursuant to 28 U.S.C. § 1391(e).
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INTRADISTRICT ASSIGNMENT

9 13. A substantial part of the events and omissions giving rise to the claims in this case
10 occurred in the County of San Francisco. Accordingly, assignment to the San Francisco Division
11 or the Oakland Division is proper pursuant to Civil L.R. 3-2(c) and (d).
12

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PARTIES

15 14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3)
16 corporation incorporated in California. The Center for Biological Diversity has approximately
17 68,000 members throughout the United States and the world. The Center for Biological
18 Diversity's mission is to ensure the preservation, protection, and restoration of biodiversity,
19 native species, ecosystems, public lands and waters, and public health through science, policy,
20 and environmental law. Based on the understanding that the health and vigor of human societies
21 and the integrity and wildness of the natural environment are closely linked, the Center for
22 Biological Diversity is working to secure a future for animals and plants hovering on the brink of
23 extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us.
24

25 15. The Center for Biological Diversity and its members include individuals with varying
26 interests in wildlife species and their habitat ranging from scientific, professional, and
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1 educational to recreational, aesthetic, moral, and spiritual. Further, the Center for Biological
2 Diversity's members enjoy, on an ongoing basis, the biological, scientific, research, educational,
3 conservation, recreational, and aesthetic values of the regions inhabited by these species,
4 including the regions at issue in this action. The Center for Biological Diversity's members
5 observe and study native species and their habitat, and derive professional, scientific,
6 educational, recreational, aesthetic, inspirational, and other benefits from these activities and
7 have an interest in preserving the possibility of such activities in the future. The Center for
8 Biological Diversity and its members have participated in efforts to protect and preserve natural
9 areas, including the habitat essential to the continued survival of native species, and to address
10 threats to the continued existence of these species, including the threats posed by air pollution
11 and other contaminants.
12
13

14 16. Plaintiff the CENTER FOR ENVIRONMENTAL HEALTH is an Oakland, California
15 based non-profit organization that helps protect the public from toxic chemicals and promotes
16 business products and practices that are safe for public health and the environment. The Center
17 for Environmental Health works in pursuit of a world in which all people live, work, learn, and
18 play in healthy environments.
19

20 17. Plaintiff SIERRA CLUB is the oldest and largest grassroots environmental organization
21 in the United States, with more than 795,000 members nationally. Sierra Club's mission is to
22 explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible
23 use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore
24 the quality of the natural and human environment; and to use all lawful means to carry out these
25 objectives. Sierra Club performs this mission through advocacy, litigation, and educational
26 outreach to its members and state chapters. Sierra Club and its members are greatly concerned
27
28

1 about the effects of air pollution on human health and the environment and have a long history of
2 involvement in activities related to air quality.

3 18. Plaintiffs' members live, work, recreate, travel and engage in other activities throughout
4 the areas at issue in this complaint and will continue to do so on a regular basis. Pollution in the
5 affected areas threatens and damages, and will continue to threaten and damage, the health and
6 welfare of Plaintiffs' members as well as their ability to engage in and enjoy their other
7 activities. Pollution diminishes Plaintiff's members' ability to enjoy the aesthetic qualities and
8 recreational opportunities of the affected area.
9

10 19. EPA's failure to timely perform the mandatory duties described herein also adversely
11 affects Plaintiffs, as well as their members, by depriving them of procedural protection and
12 opportunities, as well as information that they are entitled to under the Clean Air Act. The
13 failure of EPA to perform the mandatory duties also creates uncertainty for Plaintiffs' members
14 as to whether they are exposed to excess air pollution.
15

16 20. The above injuries will continue until the Court grants the relief requested herein.
17

18 21. Defendant ANDREW R. WHEELER is the Acting Administrator of the United States
19 Environmental Protection Agency. In that role Acting Administrator Wheeler has been charged
20 by Congress with the duty to administer the Clean Air Act, including the mandatory duties at
21 issue in this case.
22

23 **LEGAL BACKGROUND AND FACTS**

24
25 22. Congress enacted the Clean Air Act to "speed up, expand, and intensify the war against
26 air pollution in the United States with a view to assuring that the air we breathe throughout the
27 Nation is wholesome once again." H.R.Rep. No. 1146, 91st Cong., 2d Sess. 1,1, 1970 U.S.Code
28

1 Cong. & Admin. News 5356, 5356. To promote this, the Act requires EPA to set National
2 Ambient Air Quality Standards for certain pollutants, including SO_x. National Ambient Air
3 Quality Standards establish maximum allowable concentrations in the air of these pollutants.

4 23. Each National Ambient Air Quality Standard must be stringent enough to protect public
5 health and welfare. Effects on welfare include, but are not limited to, effects on soils, water,
6 vegetation, manmade materials, wildlife, visibility (*i.e.*, haze), climate, damage to property,
7 economic impacts and effects on personal comfort and well-being.
8

9 24. EPA set a primary and secondary SO_x in 1971. 36 Fed. Reg. 8,186 (Apr. 30, 1971).
10 EPA set an additional primary SO_x in 2010. 75 Fed. Reg. 35,520 (June 22, 2010).

11 25. Due to both the more stringent numerical limit and shorter averaging time as compared to
12 the previous SO_x NAAQS, the 2010 SO_x NAAQS is far more protective of human health than
13 the prior SO_x NAAQS and promises huge health benefits. EPA estimated that 2,300 to 5,900
14 premature deaths and 54,000 asthma attacks a year will be prevented by the new standard.
15

16 26. Timely implementation of the new NAAQS is critical. Considering the scientific
17 evidence, each year implementation of the one-hour SO₂ NAAQS is delayed, up to 5,900 more
18 people will die prematurely and 54,000 asthma attacks will occur unnecessarily. Further, EPA
19 estimates that the net benefit of implementing the 75 ppb SO₂ NAAQS is up to \$36 billion
20 dollars. Those individuals who suffer from health impacts caused by exposure to SO_x levels
21 above the NAAQS will have greater medical costs with each year implementation is delayed
22 and, as a result, the monetized benefits of implementing the one-hour SO_x NAAQS will go
23 unrealized. Further, the ability of those individuals to enjoy everyday activities such as exercise,
24 school, and work will continue to be negatively impacted.
25

26 27. The Clean Air Act requires EPA to determine whether any state implementation plan
27
28

1 submittal is administratively complete. *See* 42 U.S.C. 7410(k)(1)(B). If a state fails to submit
2 any required state implementation plan by the deadline for its submittal, there is no submittal that
3 may be deemed administratively complete and EPA must make a determination stating that the
4 state failed to submit the required state implementation plan. 42 U.S.C. § 7410(k)(1)(B). This is
5 referred to as a “finding of failure to submit.”

6
7 28. If a state does submit a SIP submittal, EPA has a mandatory duty to take final action on
8 the submittal by approving it, disapproving it or approving it in part and disapproving it in part
9 within 12 months of when the submittal is deemed administratively complete. 42 U.S.C. §
10 7410(k)(2)-(4).

11
12 29. If EPA disapproves a SIP submittal or makes a finding that a state has failed to submit a
13 SIP submittal by the deadline for submittal, EPA has a mandatory duty to promulgate a Federal
14 Implementation Plan (FIP) no later than two years after disapproving a SIP submittal. 42 U.S.C.
15 § 7410(c).

16
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18 **CLAIMS FOR RELIEF**

19 **CLAIM ONE**

20 **(Failure to take final action on SIP submittals)**

21 30. Plaintiffs incorporate by reference all paragraphs listed above.

22
23 31. It has been more than 12 months since the states listed in Table 1 above have submitted
24 and had determined or deemed administratively complete the 2010 SO_x NAAQS nonattainment
25 SIP elements listed in Table 1 above for the 2010 SO_x NAAQS nontainment areas listed in
26 Table 1 above.

27 32. EPA has not taken final action, pursuant to 42 U.S.C. § 7410(k)(2)-(4), on the 2010 SO_x
28

1 NAQS nonattainment SIP elements listed in Table 1 above.

2 33. Accordingly, EPA is violation of its mandatory duty under 42 U.S.C. § 7410(2)-(4) to
3 take final action on SIP submittals listed in Table 1 above within 12 months of them being
4 administratively complete.

5 **CLAIM TWO**

6 **(Failure to issue findings of failure to submit)**

7 34. Plaintiffs incorporate by reference all paragraphs listed above.

8
9 35. EPA set a primary and secondary SOx NAAQS in 1971. 36 Fed. Reg. 8,186 (Apr. 30, 1971).

10 States were required to submit nonattainment SIPs for the 1971 SOx NAAQS by May 15, 1992.

11 *See e.g.*

12 https://www3.epa.gov/airquality/urbanair/sipstatus/reports/so2_1971_elembynaqs.html#so2_1971_375.

13
14 1971_375. States which contain nonattainment areas which were designated in “Round 2” for
15 the 2010 SOx NAAQS were required to submit their nonattainment SIPS by March 12, 2018.

16 *See e.g.*

17 https://www3.epa.gov/airquality/urbanair/sipstatus/reports/il_elembypoll.html#so2__2010__1730

18
19
20 36. Thus, EPA has a mandatory duty to make findings of failure to submit for the 1971 SOx
21 NAAQS nonattainment SIPs by November 15, 1992 and for the 2010 SOx NAAQS “Round 2”
22 areas by September 12, 2018.

23 37. The states listed in Table 2 above, have not submitted nonattainment SIPs for the
24 nonattainment areas listed in Table 2 above.

25 38. It is more than six months after these nonattainment SIP submittals were due.

26
27 39. Yet, EPA has not issued findings of failure to submit SOx NAAQS nonattainment SIPs
28 for the nonattainment areas and elements listed in Table 2 above.

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